IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated; and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT NO. 5 in the County of Arapahoe and State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION FOR REHEARING

This Honorable Court, on March 27, 1967, entered its Per Curiam Order granting Appellees' Motion to Dismiss "for want of a substantial federal question."

Appellants herein move that this Honorable Court grant a rehearing of this matter and respectfully submit, without knowing the underlying premise of the Court's Order, that perhaps the Court may not have fully realized the potential implications of its decision.

If, by its Order, the Court is apparently indicating that *Hunter v. Pittsburgh*, 207 U. S. 161 (1907) is dispositive of the instant case, the end result is that a state, in setting up annexation procedures, may allow some property owners to vote and disregard the rights of others, disenfranchising the latter by an invidious discrimination, setting up a baseless classification. The opinion in the *Hunter* case is not a logical foundation for such a result. The ratio decedendi of the *Hunter* case was that the annexation procedure set up, by giving the right to vote to members of the same class in each of the two communities involved, was not violative of any rights, although the voters in Pittsburgh could by weight of numbers overwhelm any opposition in the City of Allegheny.

In the instant case, Appellants contend that the right to vote has not been granted equally to all property owners in the affected area and this inequality constitutes a deprivation of constitutional rights and, therefore, presents a substantial federal question.

The issue here is of effect not only to the citizens of the county involved in the instant case, but to every political subdivision of every state throughout the United States. Some sixty years have elapsed since the opinion of this Honorable Court in *Hunter v. Pittsburgh* and substantial changes have occurred in the patterns of American urban living in the interim. The suburban concept was not conceived as we understand it today at the time of *Hunter*. At that time this Honorable Court had not thought it necessary or proper to consider matters until recently thought within the sole province of the states, such as the question of proportionate representation in state legislative bodies. It is equally significant and necessary that this Court examine other fundamental rights once believed to be beyond the scope of the protection of the Federal Constitution.

In the instant case, continued invasions by the City and County of Denver may ultimately result in a dissolution of the suburban county as an effective political subdivision, based upon the challenged statutes which in-

vidiously discriminate between real parties in interest who reside in the geographic area concerned as to which of them may or may not petition for or against annexation. The voice of those allowed no vote in the question of annexation will also become less significant in other levels of the governmental process as well, without their being granted the right of protest to the arbitrary action authorized by statutes beyond the pale of due process and equal protection.

A further direct result of this Court's failure to review the instant case is to dilute the one-man one-vote concept expressed in *Lucas v. Forty-Fourth Gen. Assem. of Colo.*, 377 U.S. 713 (1964) at both the state and federal levels. Continued annexations, under the inequitable annexation procedures described in this case, will inevitably result in unequal representation in the legislative branches of government. The City and County of Denver constitutes one congressional district, while the County of Arapahoe, of which the subject area has been a part, is included within a different congressional district. The constituencies of Reps. Byron Rogers and Donald Brotzman may be continually enlarged and depleted without corresponding changes in the Congressional Districts, thereby disrupting the voting balance required by the *Lucas* doctrine.

Appellants respectfully point out that neither the trial court nor the Colorado Supreme Court resolved Appellants' claims of deprivation of Federal Constitutional rights. As this Court stated in the *Lucas* case at page 736, "Courts sit to adjudicate controversies involving alleged denials of constitutional rights." By ignoring Appellants' claims of such denials, the lower courts were derelict in their duty to the Appellants herein.

This Court's language in *Lucas*, at pp. 736, 737, quoting *West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L. Ed. 1628,

> "One's right to life, liberty, and property *** and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. A citizen's con-

stitutional rights can hardly be infringed simply because a majority of the people choose that it be."

Changing "vote" and "elections" in the foregoing quotation to "legislative action", the principal is the same. State legislatures by their actions cannot deprive citizens of federally protected constitutional rights.

WHEREFORE, the classification set up by the Colorado Legislature having no rational basis in law or fact, the Appellants have been deprived of property without due process and equal protection of law and such deprivation does in fact raise a substantial federal question.

Respectfully submitted,
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Attorney for Appellants

CERTIFICATE OF COUNSEL

COMES NOW HARRY L. ARKIN, counsel for Appellants, and hereby certify that I have carefully examined the Order of the Court granting the Motion To Dismiss in the above and foregoing case and from such examination I have prepared the above and foregoing Motion For Rehearing is hereby presented in good faith and not for delay.

HARRY L. ARKIN

CERTIFICATE OF SERVICE

I, HARRY L. ARKIN, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Motion For Rehearing upon The City and County of Denver, being the only adverse party involved herein, by depositing a true and correct copy thereof in a United States

post office mail box with first class postage prepaid, addressed to its counsel of record, Max P. Zall, City Attorney, and Thomas G. Roche, Assistant City Attorney, City and County of Denver, 353 City and County Building, Denver, Colorado 80202, and by depositing two true and correct copies of said Motion For Rehearing in a United States post office mail box with first class postage prepaid, addresesd to its counsel of record, Charles S. Rhyne, Brice W. Rhyne, Alfred J. Tighe, Jr., Rhyne & Rhyne, 400 Hill Building, Washington, D.C. 20006, on this 14th day of April, 1967.

HARRY L. ARKIN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ROGERS ET AL. *v.* CITY AND COUNTY OF DENVER ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 998. Decided March 27, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.